

# Western Maine Planning Process

## Zoning Options Overview

### Background:

The practice of zoning as a form of land use regulation was developed as a mechanism for anticipating and preventing nuisances. As an exercise of the police power of government, zoning is used to control development that would otherwise harm the community – “harm” being a large concept including damage to the environment, property values, public health, etc.

For municipalities, the rule has always been that zoning must be an outgrowth of a land use plan. (More recently, Maine has defined a land use plan as being part of a larger comprehensive plan, so that land use is managed in the context of other considerations, such as the transportation system, public services, and so on.) The planning process permits public debate and weighing of competing values prior to the legislative act of regulating development. Zoning, in municipal usage, is “pro-active,” meaning that zones are established in anticipation of the type of development. For example, a commercial zone is where the town wants to see businesses establish; a high-density residential zone would be appropriate for an area with potential for multi-family homes and apartments.

A city or town is a relatively small space, where we can easily grasp the dynamics of the local economy, demographic trends, landforms, and so on. The unorganized territories of the state is a different ballgame. The UT is simply too large to apply the same rules. Even though the Land Use Planning Commission has a Comprehensive Land Use Plan, it cannot be specific enough to identify local development trends. Except in areas with focused regional plans, such as the Rangeley area or the Moosehead Plum Creek lands, LUPC zoning is “re-active,” meaning that it is designed to be changed in response to development trends. The “Management” district in Chapter 10 is often the subject of rezoning requests, because it is the district “for which plans for additional development are not presently formulated.”

The principal difference between pro-active and reactive zoning approaches is that the former is designed not to change, while the latter is expected to. In fact, municipal zoning can be changed, but the process is intentionally very difficult.

### Traditional Zoning versus Performance Zoning:

As a tool for land use regulation, zoning was aimed at a specific problem: elimination of noxious uses in places that people lived. The earliest zoning laws prevented industrial development, with its air and water pollution, noise, and other impacts, from locating in residential neighborhoods. Later versions got more specific with their prohibitions, banning residential uses in commercial areas, mobile homes in high-class neighborhoods, and adult

entertainment in downtown areas, as examples. They also got more fragmented, as zones got fragmented into smaller subcategories in response to more sophisticated development.

This “use-based” zoning approach (also called “conventional” zoning) has a very simple premise: incompatible uses should not be located next to each other. Simple premise and simple to administer – if you are not on the list of approved uses, you will not be permitted to develop. Your only option is to seek a zoning change. In municipalities, this is a long and costly process, used mostly by developers who have already made a significant investment. Under Chapter 10, it is easier, but still time-consuming.

Use-based zoning was developed at a time when development practices were outpacing our understanding of the environmental, economic, and social impacts of development. We have seen two more recent trends that make use-based zoning less relevant. The first is an increased understanding of how to manage the negative impacts of development. We now have technology that can at least soften the physical impacts of development: noise, light, pollution, vehicles, visual impacts.

The second trend is not so much “progress” as an unintended consequence of zoning progress. Many businesses are not monolithic, in the sense of doing only one thing. Business people – at least the smart ones – are always looking for opportunities to increase their viability. In early forms of development, this meant living above the shop. In much of the 20<sup>th</sup> Century, we had the general store, which sold food out the front and tractor parts out the back. More recently, we have convenience stores, which sell retail but also prepared food, gasoline, online access, and showers for truckers. Use-based zoning, particularly as it has become fragmented, cannot keep up with this.

In response to these trends, most local governments have moved towards “performance-based” zoning. A pure example of performance-based zoning is one in which there are a set of performance and design standards with almost no outright prohibitions on development. Small towns in Maine who are experimenting with zoning for the first time (and without so much development diversity) are adopting this approach. Larger towns are going part-way – still retaining use-based districts but becoming more liberal and flexible in uses allowed.

The greatest advantage in performance-based zoning is that a developer is less likely to be shut out altogether. There are two disadvantages: first that the regulation has more grey area, instead of the black/white yes or no of use-based zoning. The second is that meeting performance standards makes a development more costly. Academically, you can argue that the added cost is just shifting the costs that used to be borne by the community (loss of property value, environmental impacts) onto the developer, making the regulation more of a free market transaction, but that does not obscure the increase in development costs.

In addition to reducing the number of prohibited uses, a performance-based zoning approach also reduces the need for a proliferation of zones. In many towns, zoning consists of just two zones: growth and rural. If there is an historic downtown, maybe that is a third zone to accommodate traditional densities and setbacks. It would be as if the LUPC only had three

districts overall: Protection, Management, and Development. (This is not possible under the current CLUP.)

Chapter 10 already contains a fairly comprehensive list of performance standards. A subject for committee deliberation should be what additional standards would be necessary, given the range of potential development expected. If this process is one of focus on outdoor recreation, look at the potential impacts recreational development could have on the resource and what kind of regulation is needed to soften the impact. In some cases, the impact will be location, for which a zone designation would be appropriate, but for others the impact could be addressed with performance standards or with caps on development size.

#### Creative Zoning Options:

Several creative approaches to modification of zoning rules have been tried over the years. Some of them are listed below, although the scope of performance-based zoning has mostly eliminated the need for them.

- Conditional or Contract Zoning is used as a tool for rezoning in response to a specific development proposal. Although the LUPC is often faced with rezoning requests, contract zoning is slightly different, in that it requires an actual change in the zoning rules. It is somewhat similar to the LUPC incorporating a concept plan into its rules. In municipal practice, it is often used to extract specific concessions from the developer, although illegal if not closely defined. Its best use is for projects that may not have been envisioned when the zoning was established. With performance zoning, there is less chance that a project will need rezoning, and more chance that the performance standards will already cover the impacts.
- Floating Zones are zones which are described in the ordinance, but not shown on the map until such time as the development requests it. A town may write standards for a shopping mall, for example, but not locate it on a zoning map until a proposal came forth. Some of the sub-districts in Chapter 10 are essentially floating zones, in that they can be applied as the need arises. Conceivably, you could limit the landing spot for a floating zone, for example only in the M-gn zone, but it seems as if the same result could be obtained by simply writing a very specific set of performance standards for the particular use. Municipal ordinances often have standards specific to gravel pits, adult entertainment, campgrounds, and so on.
- Overlay Zones are usually used as zones for protection of a certain resource where you are not really sure of the boundaries or want to keep the integrity of the underlying zone. In an overlay zone, the same uses and standards apply as in the underlying zone, but there are special rules to protect the resource. An overlay zone might be defined for vernal pools, steep slopes, or aquifer areas. They serve mostly to put the developer on notice of a protected resource in the area, but most towns have opted to discard overlay zones in favor of performance standards for the resource.